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IN THE

upreme Court of the United States

October Term, 1929.

No. 364.

ARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, et al.,

Appellants,

vs.

GREAT NORTHERN RAILWAY COMPANY, et al.,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This is an appeal from an order granting an interlocutory injunction.

Appellants are the Board of Railroad Commissioners of the State of North Dakota and the members thereof, and the Attorney General of that state. Appellees are common carriers by railroad engaged in transporting shipments intrastate in North

Dakota and interstate to, from and through North Dakota and other states.

On July 9, 1929, upon application of appellees, the District Court of the United States for the District of North Dakota, consisting of three judges as required by Section 266 of the Judicial Code (Title 28, U. S. C., Section 380) issued an interlocutory injunction enjoining appellants from attempting to put into effect or to enforce an order of appellant Board of Railroad Commissioners of North Dakota dated May 8, 1929, prescribing a reduced scale of class rates for intrastate application in North Dakota on appellees' lines of railroad. Appellants were so enjoined only until the Interstate Commerce Commission, in proceedings then pending before it, has determined whether said reduced intrastate class rates cause unjust discrimination against interstate commerce in violation of Section 13 of the Interstate Commerce Act.

The application for the interlocutory injunction was submitted by the parties and determined by the court upon appellees' verified bill of complaint, as amended, and the affidavits of J. G. Morrison and P. B. Beidelman, and upon appellants' verified answer and the affidavits of Neal E. Williams, T. A. Durrant, G. M. Springer and E. M. Hendricks. From the order granting this injunction appellants take this appeal direct to the Supreme Court of the United States pursuant to the provisions of the section of the Judicial Code referred to above.

STATEMENT OF THE FACTS.

There is set forth below a brief statement of the facts essential to determine the questions presented on this appeal. The bill of complaint, as amended, alleges:

Prior to August 26, 1920, the same scale of class rates applied intrastate in North Dakota on appellees' lines as applied interstate on their lines between points in North Dakota, Minnesota, and South Dakota, except that from Minneapolis, St. Paul and Duluth to North Dakota points the rates were slightly lower than the North Dakota intrastate rates for corresponding distances. On August 26, 1920, the interstate class rates to, from and through North Dakota were increased 35% in some instances and 33 1/3% in others, pursuant to authority to make a general advance in all interstate rates granted to appellees by the Interstate Commerce Commission in *Ex Parte 74 (Increased Rates, 1920,* 58 I. C. C. 220) (R. 4).

Appellees applied to appellant Board of Railroad Commissioners of North Dakota for authority to make corresponding increases in the North Dakota intrastate rates, including class rates, which application was denied, thus leaving the intrastate class rates on a lower level than the interstate class rates. Subsequently in Docket 12,085 (*North Dakota Rates, Fares and Charges,* 61 I. C. C. 504), a so-called Section 13 case, the Interstate Commerce Commission on May 3, 1921, made a finding that the interstate class rates, established by appellees as a result of *Ex Parte* 74, result in reasonable rates and charges for interstate transportation and that the failure to correspondingly increase the intrastate class rates within the state of North Dakota

> "has resulted and will result in intrastate rates and charges lower than the corresponding rates and charges maintained

> on interstate traffic within the state of North Dakota, and between points in the state of North Dakota, and points in other states, in undue preference of and advantage to shippers of intrastate traffic within the state of North Dakota, in undue prejudice to shippers of interstate traffic, and in unjust discrimination against interstate commerce."

The Interstate Commerce Commission made a further finding that said undue preference and prejudice can and should be removed by making increases in the North Dakota intrastate rates, including the class rates, which will correspond with the increases theretofore made by appellees in the interstate rates under *Ex Parte 74*. An order was made to that effect and complied with. Thereupon the relationship between the North Dakota intrastate class rates and the interstate class rates which existed prior to August 26, 1920, was restored (R. 4-5).

About a year later appellant Board of Railroad Commissioners of North Dakota entered an order in the proceeding before it in which appellees were denied permission to increase the intrastate rates, reciting that the order of the Interstate Commerce Commission in the Section 13 case, Docket 12,085, "practically deprived this commission of its power to regulate intrastate rates, fares and charges of the common carriers herein involved," and that "appropriate action should be taken to terminate the disability of the State of North Dakota and the Board of Railroad Commissioners of North Dakota." After making these recitals the order provided that all the intrastate rates established by appellees herein as a result of the Interstate Commerce Commission's order in Docket 12,085 "be continued in force and effect until revoked, modified or superseded by appropriate lawful proceedings before this Commission or as otherwise provided by law" and that a copy of said order be served on the Interstate Commerce Commission "with appropri-

ate application for the rescinding of its order in Docket 12,085" (R. 5-6).

Thereafter appellant Board of Railroad Commissioners of North Dakota filed such an application with the Interstate Commerce Commission and that Commission on July 22, 1922, entered a further order in its Docket 12,085, reciting that if its order of May 3, 1921, were vacated "the existing increased intrastate rates and charges for freight service in said state will continue in force and effect until revoked, modified or superseded by appropriate lawful proceedings before said Board or as otherwise provided by law." This further order of the Interstate Commerce Commission vacated the order of May 3, 1921, insofar as it related to intrastate freight rates in North Dakota. Thereupon appellant Board of Railroad Commissioners of North Dakota regained jurisdiction over the intrastate rates to the extent permitted by law under the circumstances (R. 6).

On May 8, 1929, the North Dakota Board entered an order in a proceeding before it, instituted on its own motion, reducing the intrastate class rates. This is the order enjoined by the lower court. A copy of the order is found at pages 15 to 24 of the Record (R. 26).

This order of May 8, 1929, required, among other things, the establishment of an intrastate scale of distributing or jobbing class rates 10% lower than the existing class rates, to apply between all jobbing or distributing points in North Dakota, and to and from such distributing or jobbing points, and to apply as maxima at intermediate points. The North Dakota Board subsequently extended the effective date of this order to July 12, 1929 (R. 27).

At the time the North Dakota Board made its order of May 8, 1929, the interstate class rates resulting from *Ex Parte 74*, and the North Dakota intrastate class rates resulting from the

Interstate Commerce Commission's order in the Section 13 case, which rates were later adopted by the North Dakota Board, were still in effect, except (1) that effective July 1, 1922, both the interstate and intrastate class rates were reduced 10% as were all rates generally; and (2) that effective September 11, 1925, as a result of the Interstate Commerce Commission's findings and order in its Docket 13,839, known as the *Fargo Case*, 98 I. C. C. 691, the interstate class rates from Fargo, N. D., to points in Minnesota within a radius of 150 miles of Fargo were increased and the interstate rates from Minneapolis, St. Paul and Duluth to Fargo were increased, and to Jamestown and Valley City, N. D., were increased for some classes and reduced for others (R. 6). Because of this increase in some of the interstate rates without any change in the intrastate rates the intrastate class rates were more favorably related to the interstate class rates on May 8, 1929, than they were under the relationship which the Interstate Commerce Commission found in the Section 13 case should exist to avoid unjust discrimination against interstate commerce.

Compliance with the order of May 8, 1929, would result in a 10% reduction in the rates on 90% of the intrastate traffic which moves on class rates and would place the intrastate class rates in North Dakota more than 10% below the class rates now generally applicable interstate between Minnesota, North Dakota and South Dakota. On May 8, 1929, the interstate class rates between North Dakota and Montana were higher than the North Dakota intrastate class rates and the order of May 8, 1929, would result in making the North Dakota intrastate class rates very substantially below the interstate class rates applying between Montana and North Dakota. (For details as to the disparity which would be caused between interstate and intrastate class rates see paragraph XI of bill of com-

plaint, R. 8-10, as amplified by affidavit of J. G. Morrison, R. 78.)

The order of May 8, 1929, if complied with, would result in a very substantially more favorable relationship of intrastate class rates in North Dakota to the interstate class rates to, from and through that state than the relationship which the Interstate Commerce Commission found in the Section 13 case should exist to avoid a violation of Section 13 of the Interstate Commerce Act (R. 9-10).

Compliance with the order of May 8, 1929, will reduce the net revenues of appellees herein at least $118,000 per annum (R. 10).

Said interstate and intrastate class rates are interrelated and interdependent and the order of May 8, 1929, is violative of Section 13 of the Interstate Commerce Act which expressly forbids the establishment by state authorities of intrastate rates which cause unjust discrimination against or a burden upon interstate commerce. (For details of respects in which unjust discrimination against interstate commerce and against persons and localities will result see pp. 10 and 11 of Record.)

On March 12, 1925, the Interstate Commerce Commission instituted a proceeding before that body known as Docket 17,000, *Rate Structure Investigation*, to determine to what extent, if any, any interstate rates of any carrier in the United States subject to its jurisdiction were unjust, unreasonable, unjustly discriminatory, or unduly preferential, and to determine

> "to what extent and in what manner, if any, the rates, as above defined, of such common carriers cause undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce."

This proceeding was instituted as a result of the Hoch-Smith Resolution of Congress. (The Commission's order instituting the proceeding and the Resolution are reproduced at pages 14 to 17 of appellants' brief.)

Subsequently the Interstate Commerce Commission entered upon extended hearings in said proceeding, particularly with respect to the class rates. The relation that shall prevail between the North Dakota intrastate class rates and the interstate class rates in order to avoid a violation of Section 13 of the Interstate Commerce Act is in issue in said Docket 17,000. Appellees herein and appellant Board of Railroad Commissioners of North Dakota appeared and participated in that proceeding and introduced evidence relating to that issue, and the case was submitted to the Interstate Commerce Commission on briefs the latter part of 1928.*

Subsequent to the issuance of the order of May 8, 1929, and prior to the filing of the bill of complaint herein, appellees filed a petition with the Interstate Commerce Commission to proceed under Section 13 of the Interstate Commerce Act to determine whether or not said scale of class rates required by the order of May 8, 1929, will unjustly discriminate against persons and localities in interstate commerce or constitutes a burden on interstate commerce. The filing of such a petition by carriers is expressly authorized by Section 13 of the Interstate Commerce Act. A copy of this petition is found at page 29 *et seq.* of the Record. This proceeding under Section 13 to determine whether the rates required by the order of May 8, 1929, result in unjust discrimination against interstate commerce is pending

*Subsequent to the issuance of the interlocutory injunction in this case a proposed report was issued by the Examiners of the Interstate Commerce Commission in *Rate Structure Investigation*, Docket 17,000, Part 2, Class Rates, and the case was orally argued before the Commission on October 21-25, 1929, and has since been pending for decision.

before the Interstate Commerce Commission in addition to Docket 17,000 (R. 27-28).

In case the reduced intrastate class rates required by the order of May 8, 1929, go into effect appellees will suffer irreparable loss and injury if the reduced intrastate rates are ultimately found by the Interstate Commerce Commission to result in a violation of Section 13 of the Interstate Commerce Act and that Commission prescribes class rates for intrastate application in North Dakota which are higher than the rates required by the order of May 8, 1929 (R. 28).

The statutes of North Dakota provide a penalty for noncompliance with orders of the North Dakota Railroad Commission of not less than $500.00 nor more than $5,000.00 for each offense and also subject appellees to treble damages sustained by shippers through failure to comply with the Commission's orders. The statutes also make it the duty of the Board of Railroad Commissioners to inquire into any neglect or violation of the laws of the state of North Dakota and to enforce the laws of the state relating to railroads. The Attorney General of North Dakota is by statute made *ex officio* attorney for the Board of Railroad Commissioners and required to give it counsel and advice to carry out the provisions of any law of the state and to institute and prosecute any actions which the Board of Railroad Commissioners may deem proper and expedient (R. 2-3).

Appellants threaten to commence numerous proceedings and prosecutions both for equitable or mandatory or other relief and for a multiplicity of penalties in order to force appellees to charge and collect the scale of class rates prescribed by the order of May 8, 1929, unless appellees voluntarily file new tariffs and put such rates into effect. Said threatened proceedings would prevent appellees from obeying the mandate of

the Interstate Commerce Act against unlawful discrimination against interstate commerce. Appellees are without a plain, adequate and complete remedy at law (R. 12-13).

The prayer of the bill is for an interlocutory injunction restraining appellants from putting the order of May 8, 1929, into effect "until and only until" the Interstate Commerce Commission has determined in Docket 17,000 or in the Section 13 case pending before it, whether the reduced intrastate rates would result in a violation of Section 13 of the Interstate Commerce Act (R. 13-15).

The application for interlocutory injunction was argued before a court of three judges on July 2, 1929, was taken under advisement, and on July 8, 1929, the court rendered its decision directing that the injunction issue. This decision is found at p. 84 of the Record and is reported *Great Northern Ry. Co., et al., v. Board of Rd. Commissioners of N. D., et al.*, 33 Fed. (2nd) 934.

The injunction issued July 9, 1929 (R. 88), and enjoins appellants from putting into effect or enforcing the order of May 8, 1929,

> "until the Interstate Commerce Commission has determined, either in its Docket 17,000, Part 2, now pending for decision, or in the proceeding under Section 13 of the Interstate Commerce Act which the plaintiffs herein have petitioned the Interstate Commerce Commission to institute, the question of whether the establishment and collection of the intrastate distributing or jobbing scale of class rates prescribed in said order of May 8, 1929, causes any undue or unlawful advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or in undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and until the further order of this Court."

The court required appellees to give bond for $150,000 to the United States for the benefit of those affected, conditioned that

> "if it shall be determined that the rates fixed by the order of May 8, 1929, were lawful rates, said plaintiffs will make refunds of the difference between what intrastate shippers have been required to pay and what they would have paid if an injunction had not been granted."

These bonds were filed and the injunction became operative prior to July 12, 1929, the effective date of the order of May 8, 1929, of the North Dakota Board.

The requirements of the order of May 8, 1929, with respect to rates other than distributive class rates were complied with by appellees and are not involved in this proceeding.

ARGUMENT.

A FEDERAL COURT OF EQUITY HAS POWER TO PREVENT IRREPARABLE LOSS AND DAMAGE, OR A THREATENED VIOLATION OF LAW, BY ENJOINING INTRASTATE RATES UNTIL THE INTERSTATE COMMERCE COMMISSION CAN DETERMINE IN A PENDING PROCEEDING WHETHER SUCH RATES UNJUSTLY DISCRIMINATE AGAINST INTERSTATE COMMERCE.

The above proposition is amply supported by the acts of Congress and the decisions of the courts.

A State Is Prohibited from Unjustly Discriminating Against Interstate Commerce.

Article I, Section 8, of the Constitution of the United States grants Congress the power "to regulate commerce * * * among the several states." The object of this clause was to prevent interstate commerce from being impeded or destroyed by local governments. While Congress does not possess authority to regulate the internal commerce of a state, as such, it does possess power to foster and protect interstate commerce. The use by a state of an instrument of interstate commerce in a discriminatory manner so as to inflict injury on any part of that commerce is a ground for Federal intervention. *The Shreveport case* (*Houston & Texas Ry. v. U. S.*, 234 U. S. 342).

In that case the court held that Congress by Section 3 of the Interstate Commerce Act delegated to the Interstate Commerce Commission power to prevent all discriminations against interstate commerce which Congress has the power to condemn. Since that decision Congress amended the Interstate Commerce Act by adding paragraphs (3) and (4) to Section 13 which deal specifically with unjust discrimination against interstate

commerce by states, expressly making it unlawful.* Wisconsin Passenger Fare case (*Rd. Com. of Wisconsin v. C. B. & Q. Rd. Co.*, 257 U. S. 563).

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*Paragraphs (2) and (3) of Section 13 of the Interstate Commerce Act read as follows:

"(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act."

The I. C. C. Has Sole Jurisdiction to Determine the Question of Unjust Discrimination Against Interstate Commerce.

This proposition is well settled. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Houston & Texas Ry. v. U. S., supra.*

Unjust Discrimination Against Interstate Commerce by States Is Forbidden Before as Well as After the I. C. C. Determines the Existence of Such Discrimination.

Paragraph (4) of Section 13 of the Interstate Commerce Act provides that any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce resulting from rates imposed by authority of any state *"is hereby forbidden and declared to be unlawful."* This is an unconditional condemnation of unjust discrimination against interstate commerce by states. Congress by Section 13 forbade and declared unlawful such unjust discrimination at all times, *before* as well as *after* the formal finding of the Interstate Commerce Commission that such unjust discrimination exists in a particular case.*

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*Unjust discriminations in freight rates were prohibited by the common law. In *I. C. C. v. B. & O. Rd. Co.*, 145 U. S. 263, the Court said at page 275:

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service (citing cases); though the weight of authority in this country was in favor of an equality of charge to all persons for similar services."

In *Sullivan v. M. & R. R. Ry. Co.*, 142 N. W. 3 (Minn.) at page 6, the Court says:

"We are content to align ourselves with those courts which have declared that the modern common law imposes upon common carriers the duty of equality in tolls to all shippers similarly circumstanced, for the transportation of the same class of goods the same distance."

See also *Homestead Co. v. Des Moines Electric Co.*, 248 Fed. 439 (C. C. A. 8th Circuit).

The Courts Will Enforce the Prohibition Against Unjust Discrimination Against Interstate Commerce by Intrastate Rates Imposed by a State.

After a finding of unjust discrimination against interstate commerce by the Interstate Commerce Commission the courts will grant an injunction to prevent a state from continuing the unjustly discriminatory situation. The courts have a similar power to prevent unjust discrimination against interstate commerce *before* the Interstate Commerce Commission makes its formal determination of the existence of such unjust discrimination, provided the court in so doing does not attempt to determine the administrative questions committed to the sole jurisdiction of the Interstate Commerce Commission. This is so for the following reasons:

The Interstate Commerce Act Saves Common Law Remedies.

Section 22, paragraph (1) of the Interstate Commerce Act, provides:

> "and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In *Pa. Rd. v. Sonman Coal Co.*, 242 U. S. 120, the Court said in referring to the above provision:

> "Thus we have held that a manifest purpose of the provision in Section 22 is to make it plain that such 'appropriate common law or statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 446-447; that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R. R. Co. v. Puri-*

tan Coal Co., 237 U. S. 121, 129; that the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the federal courts is otherwise made exclusive."

The Power to Prevent Irreparable Damage or to Enjoin a Proposed Unlawful Act Is Inherent in a Federal Court of Equity.

Section 24 of the Judicial Code, paragraph (8), (Title 28, Section 41, U. S. C.) provides that the district courts shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce."

No citation of authority is necessary for the proposition that a court of equity has the inherent power to prevent irreparable damage or to enjoin a proposed unlawful act. However, in this connection attention is called to the quotation, *infra*, from the case of *Northern Pacific Ry. Co. v. Pacific Coast Lumber Mfgrs. Assoc.*, 165 Fed. 1 (C. C. A. 9th Circuit).

In Analogous Cases Courts of Equity Have Prevented Irreparable Damage Or a Threatened Violation of Law by Holding Matters in Statu Quo Until Another Tribunal Having Jurisdiction of a Controversy Can Determine It.

In *Western Union Telegraph Co. v. L. & N. R. R. Co.*, 201 Fed. 946, affirmed by the Circuit Court of Appeals of the Sixth Circuit in 207 Fed. 1, a railroad was enjoined from interfering with the telegraph company's use of its poles and wires on the railroad right of way until pending proceedings brought by the telegraph company in a state court to condemn right of way for its lines over the railroad's property could be determined. At pages 949 and 950 of 201 Fed., it was said:

"At all events, in the peculiar conditions surrounding this case, if this court may be permitted to exercise any discretion, it will be exerted in the direction of maintaining the present status until the condemnation suit shall be finally disposed of. Indeed, this seems to us to be the course dictated alike by common sense and a proper judgment."

In *Zimmerman v. McCurdy,* 106 N. W. 125 (N. D.) it was held that where a party claims the right to possession of public land by virtue of a homestead entry against the party in possession under claim of superior right and the claims of the parties are being contested before the Federal Land Department, the courts will grant an injunction to hold the matter *in statu quo* until it is decided by the tribunal having jurisdiction thereof. At page 127 the Court said:

"The Court has no more jurisdiction to anticipate the decision of the Land Department on that question than on any other question at issue in the contest. It is, therefore, still an open question, which the court cannot yet decide, whether the plaintiff is the rightful occupant of the land or the defendant has a valid entry and the consequent right of possession. Under such circumstances an injunction is the appropriate remedy to protect the plaintiff's possession against defendant's threatened violence and maintain the status quo until the rights of the parties shall have been determined.

* * * * *

The judgment appealed from is reversed, and the district court is directed to enter a judgment for plaintiff to the effect that until the pending contest shall have been finally decided the defendant and all persons acting for or claiming under her be restrained from trespassing upon or interfering with plaintiff's possession of the land in question. * * *"

For a similar case see *Elliott v. Rich,* 172 Pac. 194 (N. M.).

In the cases cited below this principle was applied to rate cases analogous to the one at bar.

The Interstate Commerce Act was amended in 1906 to give the Interstate Commerce Commission power to determine whether interstate rates filed with the Commission by carriers were unreasonable or unjustly discriminatory and to prescribe reasonable and nondiscriminatory rates. However, it was not until the Interstate Commerce Act was amended in 1910 that the Commission was given the power to suspend tariffs filed with the Commission by carriers until the Commission could determine whether or not the proposed rates were reasonable and nondiscriminatory. During the period 1906 to 1910, when the Commission did not have the suspension power, shippers brought numerous actions in federal courts for injunctions to prevent increased interstate rates which the carriers had filed with the Commission from becoming effective until the Interstate Commerce Commission could pass on the shippers' complaints to that Commission against such rates. In the following cases it was held that such injunctions should issue where application was made *prior* to the time the proposed rates became effective:

N. P. Ry. Co. v. Pacific Coast Lumber Mfgrs. Assn., 165 Fed. 1 (C. C. A. 9th Circuit).

Union Pacific R. Co. v. O. W. Lumber Mfgrs. Assn., 165 Fed 13, (C. C. A. 9th Circuit).

Great Northern Ry. Co. v. Kalispell Lumber Co., 165 Fed. 25 (C. C. A. 9th Circuit).

Tift v. Southern Ry., 123 Fed. 789 (Circuit Court of Georgia).

Kiser Co. v. Central of Georgia Rd., 158 Fed. 193 (Circuit Court of Ga.).

Particular attention is called to the *Northern Pacific Railway Company* case, *supra*, in which the Court said at page 8:

"Upon a careful consideration of the interstate commerce act, we find no ground on which to say that it impliedly denies the equitable jurisdiction to enjoin a threatened injury such as is alleged in the bill in the present case. It is true that the courts have no power to pronounce an interstate rate unreasonable or to declare what is a reasonable rate, but this is not to say that a court of equity may not enjoin the enforcement of a threatened ruinous schedule of rates which is proposed to be adopted in the future. If such is the effect of the act, we have the anomalous situation of a threatened irreparable injury for which there is no remedy, for the Interstate Commerce Commission has no power to enjoin a proposed unreasonable new schedule of rates. *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479. To what does the reservation of legal remedies in section 22 of the act refer if not to such a remedy as this? The case calls for the exercise of a power which is inherent in a court of chancery, the power to enjoin a proposed unlawful act. The exercise of that power does not invade the province of the Interstate Commerce Commission. It prohibits the enforcement of an alleged unreasonable rate only until the commission shall have had time and opportunity to adjudge the question of its unreasonableness. To afford such relief is not to fix rates or to change existing rates, or to decide on the reasonableness of established rates, or in any way to interfere with the functions of the Interstate Commerce Commission, nor does it result in the confusion or derangement of rates so forcibly pointed out as the ground of decision in the Abilene Cotton Oil Case. Such has been the decision of the federal courts in every case in which the question has arisen."

The *Tift* case, supra, went to the Supreme Court of the United States (206 U. S. 428), but the precise question was not passed upon because the final action of the lower court was taken after the Interstate Commerce Commission had passed on the rates. However, the Supreme Court said at p. 437:

> "We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates."

In the *Kiser* case, *supra*, the court said at page 199:

> "In my judgment the restraining order should remain in force a reasonable length of time to allow the complainants to present this matter to the Interstate Commerce Commission, and in the meantime the case here will be stayed until a determination by that body as to whether the proposed increase in rate is reasonable and proper, and as to what is a reasonable rate."

Certain Federal courts, however, denied similar applications to enjoin increased interstate rates not yet in effect until the Interstate Commerce Commission could determine their lawfulness. See *Atlantic Coast Line Ry. v. Macon Grocery Co.*, 166 Fed. 206 (C. C. A. 5th Circuit). However, we believe that the correct view of the law is expressed in the *Northern Pacific Ry. Co.* case from which we have quoted above.

I. C. C. Has Passed on Section 13 Petitions While Intrastate Rates Were Enjoined.

Fertilizer between Southern Points, 113 I. C. C. 389, 430, was a case before the Interstate Commerce Commission involving a petition filed with the Commission by carriers alleging that certain intrastate rates in South Carolina resulted in undue prejudice against interstate commerce in violation of Section 13 of the Interstate Commerce Act. At page 433 the Commission said:

> "Again on January 30, 1925, the South Carolina Commission ordered a still further reduction in the carload rates on fertilizer and materials, but this order was temporarily enjoined by the Federal court for the eastern district of South Carolina, and the proceeding was still pending when argument was here had."

And at page 435 it was said:

> "Unquestionably the present rates within South Carolina prejudice persons and localities in interstate commerce and prefer intrastate shippers. Furthermore, the reduced intrastate rates prescribed by the South Carolina commission in its order of January 30, 1925, if permitted to become effective, would result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce, as compared with the interstate rates herein prescribed. As compared with the latter rates, however, the present rates in South Carolina would not, on the whole, result in such unjust discrimination or undue prejudice.
>
> With respect to these intrastate cases we find:
>
> * * * * *
>
> 3. That, in view of the rates herein prescribed, the maintenance of the present intrastate rates in South Carolina will not for the future result, on the whole, in undue prejudice to persons or localities in interstate commerce, nor in unjust discrimination against interstate commerce, but that the maintenance of the intrastate rates in that State now temporarily enjoined would result in such undue prejudice and unjust discrimination."

Summary.

A Federal Court of equity has power to prevent irreparable loss and damage, or a threatened violation of law, by enjoining intrastate rates until the Interstate Commerce Commission can determine in a pending proceeding whether such rates unjustly discriminate against interstate commerce, for the following reasons:

States are prohibited by Section 13 of the Interstate Commerce Act from unjustly discriminating against interstate commerce by establishing unduly low rates for intrastate shipments. Only the Interstate Commerce Commission has jurisdiction to determine whether such unjust discrimination exists. Unjust discrimination by states against interstate commerce is forbidden by Section 13 at all times, before as well as after its existence is determined by the Commission. The Interstate Commerce Act expressly provides that it does not abridge or alter common law remedies, which would include the inherent power of a court of equity to enjoin irreparable damage or a threatened violation of law where there is no adequate remedy at law and where the court does not assume to decide administrative questions committed to the sole jurisdiction of the Commission. Federal Courts of equity have heretofore enjoined threatened increases in interstate rates until the Interstate Commerce Commission could determine their legality, which is no different in principle from what the court below did in this case.

The injunction granted in this case was a proper remedy as it prevented irreparable damage to interstate commerce and to appellees until action is taken by the Commission, without interfering with the right of the Interstate Commerce Commission to decide the administrative questions and without inter-

fering with the right of the state to prescribe intrastate rates which do not unjustly discriminate against interstate commerce. If the Interstate Commerce Commission eventually finds that reduced intrastate rates do not discriminate against interstate commerce such reduced intrastate rates will be made effective *from the date they were ordered by the North Dakota Commission* through the carriers under their bonds refunding to shippers the difference between the rates paid and the lower rates ordered by the North Dakota Commission, thus giving intrastate shippers the benefit of the rates ordered by State authority. On the other hand, if the Interstate Commerce Commission ultimately finds that the intrastate rates required by the North Dakota Commission's order of May 8, 1929, result in the character of discrimination against interstate commerce prohibited by Section 13 of the Act, there will have been no interference with the right of the state to fix intrastate rates because the state had no right to prescribe intrastate rates which unjustly discriminate against interstate commerce.

Unjust discrimination against interstate commerce by unduly low intrastate rates can be and usually is of far-reaching and disastrous effect. Manufacturers or producers shipping in interstate commerce lose their business to competitors in a position to use the unduly low intrastate rates, one locality or state is built up and permitted to prosper at the expense of another state or locality, and carriers engaged in interstate commerce lose revenue which should legitimately come from their intrastate operations, which loss must be made up by shippers of all commodities moving in interstate commerce in many different states because under the Transportation Act the carriers are entitled to interstate rates which will give them a fair return as a whole within such territory or groups as the Interstate Commerce Commission may fix.

If the Interstate Commerce Commission ultimately condemns the reduced intrastate rates such injuries to interstate commerce, which are of such a nature as to be irreparable when once committed, will not have occurred by reason of the injunction between the effective date of the North Dakota Board's order and the effective date of the Interstate Commerce Commission's order. The injunction is merely in aid of enforcing Section 13. If such an injunction cannot issue it means that for the period intervening between the effective dates of the North Dakota Commission's order and the Interstate Commerce Commission's order we will have the anomalous situation of an act of Congress expressly prohibiting unjust discrimination against interstate commerce with no means of giving effect thereto because the Interstate Commerce Commission has no suspension power with respect to intrastate rates. Equity courts exist to avoid such situations.

If appellees complied with the order of May 8, 1929, and established the reduced intrastate rates and they are later found unlawful by the Interstate Commerce Commission, appellees have no way of going back and collecting additional amounts from shippers in intrastate commerce, while intrastate shippers can through refunds by the carriers obtain the benefit of the reduced intrastate rates notwithstanding the issuance of the injunction. The slight inconvenience on the part of intrastate shippers in turning in their freight bills and applying for refunds is a matter of trivial consequence as compared with preventing far-reaching and irreparable destruction or injury to interstate commerce and a loss to appellees of more than $118,000 per annum in net revenue.

II.

THE ONLY QUESTION WHICH THE COURT WILL REVIEW IN THIS CASE IS WHETHER THE LOWER COURT ABUSED ITS DISCRETION.

The only question which the Court will review on this appeal is whether the court below abused its discretion in granting the interlocutory injunction. In the recent case of *Alabama v. U. S.*, 279 U. S. 229, it was said at page 231:

> "It is well-established doctrine that an application for interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised (citing authorities). The rule generally to be applied in the exercise of that discretion, is stated in our recent decision in *Ohio Oil Co. v. Conway*, 279 U. S. 813.
>
> That the doctrine to be followed in reviewing such an order applies in the case of an order of a court of three judges denying an interlocutory injunction does not admit of doubt (citing authorities). The duty of this Court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused. See *U. S. v. B. & O. R. R. Co.*, 225 U. S. 306, 325. An examination of the record here reveals no such abuse, and we must remand the case to the court below for final disposition on the merits."

III.

THERE WAS NO ABUSE OF DISCRETION IN GRANTING THIS INJUNCTION.

Appellants' brief is devoted almost entirely to support their position that the lower court had no power to grant such an injunction as this under any circumstances. There is no serious claim that the court of three judges abused its discretion in issuing such an injunction as this in the event the Court had the power. This is apparent also from the fact that counsel for appellants make no reference to the contents of the lengthy affidavits which they presented to controvert certain allegations of the bill of complaint.

In the case of *Ohio Oil Co. v. Conway,* 279 U. S. 813, 815, this Court said:

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love v. A. T. & S. F. R. Co.,* 185 Fed. 321, 331-332."

The lower court's action conformed to that principle. In this case the Interstate Commerce Commission once determined that a certain relationship between the North Dakota intrastate class rates and the interstate class rates must exist in order to avoid unjust discrimination against interstate commerce and established that relationship by an order fixing the intrastate rates. That order would no doubt be in effect today if the North Dakota Commission had not subsequently by its

own order established the same rates as the Interstate Commerce Commission required. It did this in order to induce the Interstate Commerce Commission to cancel its order and thus restore to the State Commission its jurisdiction over intrastate rates. When the Interstate Commerce Commission cancelled its order it must have done so only because it considered that subsequently the State Commission had by its own act removed the unlawful discrimination and would not again create similar discriminations. The Interstate Commerce Commission's subsequent action with respect to interstate class rates was generally to increase them, thus leaving the intrastate rates more favorably related to the interstate rates, as a general proposition, than at the time the Interstate Commerce Commission made its discrimination order. The North Dakota Commission cooperated with the Interstate Commerce Commission in the Docket 17,000 proceeding regarding class rates, with a view of working out an adjustment of interstate and intrastate rates which would be lawful. After such cooperation and the taking of a large amount of evidence the appellant Board of Railroad Commissioners of North Dakota issued its order of May 8, 1929, making a 10% reduction in such of the intrastate class rates in North Dakota as move 90% of the business, and this was done without regard to the finding of the Interstate Commerce Commission in the discrimination case, which finding still stands although the order was cancelled.

Under such conditions as this the natural thing for the court of three judges to do was to hold the matter in statu quo until the Interstate Commerce Commission could render a decision in pending proceedings which would determine the question of whether the reduced intrastate rates would result in unjust discrimination against interstate commerce. The lower court had every right to believe that a serious question of unjust dis-

crimination existed and that a case of irreparable damage to interstate commerce and to appellees would occur. The lower court in its opinion stated:

> "We think, however, in view of the pendency of Docket 17,000, that the orderly and logical way to have the question finally settled is to permit the Interstate Commerce Commission to complete that investigation and file its decision before there shall be an attempt to adjust intrastate class rates even to the extent attempted by the order of May 8th. Such rates, if they prove temporary merely—as the plaintiffs contend they will—will only briefly afford the relief sought and may ultimately prove more of a disadvantage than otherwise to those for whose benefit they are intended, while at the same time they may cause a substantial loss to the carriers and an undue burden upon interstate commerce. On the other hand, if the rates are lawful—as the defendants claim—and are enjoined, their effectiveness cannot long be postponed in any event, and, to a considerable extent, the injury done by staying their effectiveness can be mitigated by requiring the railroads to make reparation in case it is found that they do not encroach upon interstate commerce and that the State Board was within its rights in fixing them."

IV.

REPLY TO APPELLANTS' CONTENTIONS.

(1) The argument upon which appellants apparently place the principal reliance is contained on pages 10 to 33 of their brief under the caption "The pendency of a proceeding before the Interstate Commerce Commission under the Hoch-Smith Resolution, known as Docket 17,000, Part 2, is not ground for and does not give the court jurisdiction to grant an interlocutory injunction."

It is said that it was "beyond the jurisdiction of the court" to enjoin the reduced intrastate rates until the administrative

question involved is determined by the Interstate Commerce Commission in its pending Docket 17,000 (R. 13). The argument to support this position is that under the commerce clause of the Constitution Federal courts have no jurisdiction, as respects intrastate rates, except for the enforcement of some act of Congress, and that intrastate rates prescribed by state authority may be affected only in the manner and to the extent that Congress by legislation, for the proper protection of interstate commerce, has so provided (R. 13); that Congress intended that the investigation by the Interstate Commerce Commission under the Hoch-Smith Resolution should result in removing unjust discrimination against interstate commerce only through the operation of orders made by the Commission, and hence the Hoch-Smith Resolution gives the Federal courts no jurisdiction over intrastate rates until after the Interstate Commerce Commission has made an order with respect thereto as a result of its investigation (R. 19). In other words, it is argued that since Congress has not made express provision by statute for suspending the operation of intrastate rates prescribed by state authority until the fact of unjust discrimination has been determined by the Commission, such power does not exist in a Federal Court of Equity in any case.

That contention is fully met by our discussion under heading I of this brief. Appellants' argument overlooks the fact that section 13 of the Interstate Commerce Act provides that unjust discrimination against interstate commerce by intrastate rates "is hereby forbidden and declared to be unlawful", which means at all times, *before* the Interstate Commerce Commission makes its finding of discrimination as well as subsequent thereto. When the lower court granted this injunction it did so in aid of enforcing this act of Congress.

Appellants' argument also overlooks the fact that Federal courts have inherent equity powers, one of which is to prevent

irreparable loss or injury in proper cases, and that the exercise of those powers is not dependent upon an express declaration by Congress of the existence of such power in connection with each law which it enacts. The injunction in this case was an appropriate common law remedy which "can be enforced consistently with the scheme and purpose of the interstate commerce act" and therefore is not abrogated or displaced by the interstate commerce act. *Pa. Rd. v. Sonman Coal Co., supra.*

There is no reason for suspending the general equity powers of courts with respect to the issuance of injunctions to prevent irreparable injury in proper cases merely because the subject matter is intrastate rates prescribed by the authority of a state. The operation of state laws and acts of state officials have been enjoined many times by Federal courts. This case should be considered no different from any other case in which an injunction is asked to prevent irreparable injury. If Congress did not intend that Federal courts should issue injunctions against state authorities in proper cases to prevent irreparable damage, why did it enact section 266 of the Judicial Code which makes express provision for a court of three judges to hear and determine applications for injunctions suspending or restraining the enforcement, operation or execution "of an order made by an administrative board or commission acting under and pursuant to the statutes of such state"?

(2) At page 32 of appellants' brief it is said that if the pendency of Docket 17,000 before the Interstate Commerce Commission prevents the North Dakota Commission from regulating the intrastate class rates here involved it disables the rate-making authorities of each state from dealing with any intrastate rates because Docket 17,000 involves the question of discrimination against interstate commerce in connection with all intrastate rates in the United States.

The lower court did not grant the injunction merely because of the pendency of Docket 17,000. The injunction was granted because of a showing made to the court that the North Dakota Commission disturbed a relationship between all interstate and intrastate class rates in North Dakota which the Interstate Commerce Commission previously found should exist in order to avoid unjust discrimination against interstate commerce, because the disparity between interstate and intrastate rates so created was substantial and that there was good reason to believe that the Interstate Commerce Commission in Docket 17,000 would condemn the reduced intrastate rates, because irreparable damage would occur if the reduced intrastate rates were not enjoined until the Interstate Commerce Commission could determine the administrative questions involved, because the North Dakota Commission and appellees participated in a hearing at which evidence was introduced with respect to these identical class rates and orderly procedure seemed to require awaiting a decision from the Interstate Commerce Commission before putting into effect a new basis of intrastate class rates which in all probability would be only temporary, and because the carriers' bonds would insure the benefit of the reduced intrastate rates to the public in the event they were finally approved by the Interstate Commerce Commission. Unless a proper showing is made a Federal Court will not enjoin any intrastate rates merely because of the pendency of Docket 17,000. If a proper showing can be made then such injunction should issue.

(3) It is implied by appellants that the injunction prevents the North Dakota Board from removing discriminations in the intrastate rate adjustment itself. As a matter of fact, the state commission by its order of May 8, 1929, created new discriminations within the state of North Dakota because it established a scale of class rates to, from and between certain towns

in the state which are to be maxima at intermediate points, which is 10% lower than the general scale of class rates which must be paid by certain other towns. Furthermore, discriminations in the intrastate class rate structure within North Dakota, if any exist, could have been remedied by increasing some of the rates and bringing them in harmony with the interstate rates rather than by reducing the rates which carry 90% of the traffic and thus placing them on a substantially lower level than the interstate rates fixed by the Interstate Commerce Commission.

(4) Appellants contend at page 45 of their brief that the injunction should not have been granted for the reason that appellees have a plain, adequate and complete remedy at law in the state courts of North Dakota because the Public Utilities Act of that state provides for a review in the state courts of the orders of the Board of Railroad Commissioners.

Assuming that appellees in this case had a plain, adequate and complete remedy at law in the state courts of North Dakota, which they did not as supersedeas orders are discretionary with the court and the court cannot determine the question of unjust discrimination against interstate commerce, that fact does not affect the equity jurisdiction of the Federal court. It is sufficient if there is no plain, adequate or complete remedy in the Federal Courts. See:

Robinson v. Campbell, 3 Wheaton 212, at p. 222.
Barber v. Barber, 21 Howard 583, at p. 591.
Sheffield Furnace Co. v. Witherow, 149 U. S. 574.
Mississippi Mills v. Cohn, 150 U. S. 202, at p. 205.
Smyth v. Ames, 169 U. S. 466, at p. 516.
Risty v. C. R. I. & P. Ry., 270 U. S. 378, at p. 388.

It is respectfully submitted that the action of the lower court in granting an interlocutory injunction in this proceeding should be affirmed.

Respectfully submitted,

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